

Missouri Senate Interim Committee on Certificate of Need

Testimony of the Missouri State Medical Association

September 12, 2006

The Missouri State Medical Association (MSMA) supports repeal of Missouri's Certificate of Need (CON) program and stridently opposes any effort to expand its purview or scope of regulatory authority. The following reasons are offered in support of that position.

(1) The CON program has outlived its usefulness.

When the idea of CON regulation was conceived, health care providers were reimbursed based on the cost of the services they provided, no matter how high that cost. Their charges incorporated overhead expenses and the other costs of doing business, as well as the necessary profit margin. Under that scheme overbuilding was costly to everybody because the expenses of inefficiency were built into the reimbursements. The regulatory mechanism of CON review was dreamed up to control costs by limiting the expansion of services in a geographic area.

Now, some thirty years later, the competitive forces of managed care have dramatically altered the healthcare marketplace. Provider payments are determined by capitation, fixed fees for services, and fee schedules that are the product of negotiation and have little or no bearing on the underlying costs. Today's providers compete on price and quality of care - not costs - and are neither rewarded for nor bailed out when they overspend on facilities or technology. Thus, CON review is no longer an appropriate tool to regulate health care costs. The free market - as with virtually every other business endeavor - should be allowed to determine need and encourage healthy competition based on price and quality of care.

(2) The CON program stifles competition.

The CON review process is an irrational, artificial barrier to entry for potential competition. The prohibitive cost of winning CON approval, even when the applicant can easily demonstrate a need for its services, has a significant chilling effect on the development of new, more efficient services and facilities, especially when an existing facility aggressively challenges

new entrants in the market place. This creates an unfair advantage for existing facilities, no matter how inefficient they may be. In July 2004, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) jointly issued a landmark report on competition in the health care market that underscored this point. Among other similar findings, that study concluded that “CON programs can pose serious competitive concerns that generally outweigh CON programs’ purported economic benefits.”¹

Additionally, some Missouri health care markets are dominated by a single health care system. Protected by the obstacles of CON review, these monopolies restrict competition and actually limit the number of providers and innovative medical services and technology that are available to patients in the community.

(3) The CON program stifles innovation.

By hindering healthy competition, CON review limits a patient’s choice to the services that already exist in the community, even if those services are outdated and inefficient. Entrenched facilities can block or slow the introduction of new and innovative services that might improve access to care, improve the quality of care, and lower health care costs. This forces patients to choose between receiving sub-optimal services locally or traveling great distances - sometimes across state lines - for necessary care. Without competition, existing facilities have no free market incentive to advance the state of the art or improve the quality of care.

The 2004 FTC/DOJ report found that “CON programs likewise can delay the introduction and acceptance of innovative alternatives to costly treatment methods.”² This delay detrimentally impacts the quality of care by thwarting the entry of providers that could offer higher quality services than existing entities. Thus, as the FTC formally opined, CON laws “foster lower quality and reduced innovation in health care markets.”³

(4) The CON program lowers the quality of care

As early as 1987 the FTC was advising state decision-makers to repeal CON laws because of their adverse impact on costs and quality of care. In a statement that year, the FTC warned that “any potential benefits of CON regulations are likely to be outweighed by the

¹Federal Trade Commission and the Department of Justice, *Improving Health Care: A Dose of Competition*, July 2004, Chapter 8, pp. 1-2.

²*Ibid.*, Chapter 8, p. 4.

³Federal Trade Commission, Bureau of Economics, *Staff Comments to Georgia State Senator Culver Kidd*, March 7, 1988.

adverse effects of such regulation on competition in health care markets. Consequently, CON regulation is likely to harm consumers on balance by increasing the price, and decreasing the quality of health services...”⁴ The 2004 FTC/DOJ report stated that by limiting competition and innovation, CON, by definition, results in reduced services. This artificially limits access and forces patients to choose services that might be of a lesser-quality than they should be. In a free market, health care facilities and other health care providers compete vigorously for patient loyalty. The quality of care improves, outcomes improve, innovations arise, jobs are created, taxes are paid, and the overall cost of health care goes down. Conversely, when patient choice is limited and insulated incumbent providers don’t have to respond to patient needs and other free market pressures, access and quality of care suffer, and costs go up.

(5) The CON program does not save money

A study published in the *Journal of Health Politics, Policy and Law* found that “Certificate of Need laws had no effect on total personal health expenditures or on per capita spending on physician’s services.”⁵ Moreover, the 2004 FTC/DOJ report found that CON programs “are generally not successful in containing health care costs and that they can pose anticompetitive risks.”⁶ It further stated that “Empirical studies indicate that CON programs generally fail to control costs and can actually lead to increased prices,”⁷ and concluded, pointedly, that CON programs “are not successful in containing health care costs.”⁸

CON advocates often boast about the “savings” allegedly attributable to program review. But these so-called savings are commonly overstated. Often they are calculated merely by adding the estimated costs of projects that are denied a certificate. The claims typically fail to account for the significant costs the program generates to achieve these “savings.” For example, they rarely offset alleged savings by the considerable administrative and legal costs incurred by the applicants, the applicants’ opponents, and the CON staff itself. And they don’t take into account the fact that existing facilities sometimes undertake expensive capital improvements in order to prevent potential competitors from meeting the requisite community need standard for application approval. Thus, the so-called savings allegedly resulting from CON review can be very misleading.

⁴Federal Trade Commission, Press Release, August 10, 1987.

⁵Conover, Christopher J., et al, “Does Removing Certificate-of-Need and Regulations Lead to a Surge in Health Care Spending?” *Journal of Health Politics, Policy, and Law*, Vol. 23, No. 3, June 1998, pp. 455-481.

⁶Federal Trade Commission and the Department of Justice, *Improving Health Care: A Dose of Competition*, July 2004, Chapter 8, p. 6.

⁷*Ibid.*, Chapter 8, p. 4.

⁸*Ibid.*, Executive Summary, p. 22.

(6) The CON program actually drives up the cost of health care

The 2004 FTC/DOJ study found that “Where CON programs are intended to control health care costs, there is considerable evidence that they can actually drive up prices by fostering anticompetitive barriers to entry.”⁹ Where there is no price competition, existing facilities have no incentive to reduce costs; in fact they can charge higher prices than a free market would allow. The FTC/DOJ report stated that CON actually increases costs by protecting existing facilities from competition which, in turn, “can delay the introduction and acceptance of innovative alternatives to costly treatment methods.”¹⁰ The study also states that because they protect incumbent providers from competition, “CON programs may actually increase health care costs, as supply is depressed below competitive levels.”¹¹

The FTC conducted an independent study in 1987 and found that states with CON laws generally had higher hospital expenses. Conversely, the study determined that areas with greater concentrations of hospitals had higher quality of care at the same price due to competition.¹² Contrary to its purpose, CON review increases costs for patients and insurers by limiting patient choice.

Even when an application is unanimously supported, the CON process increases health care costs. For example, a lone facility in an under-served area wanting to expand to provide a clearly necessary new service must needlessly spend tens of thousands of dollars to run the CON gauntlet in order to win approval for a project that nobody opposes. This is money that would be much better spent to directly improve the quality of care for patients in the community.

(8) There is no demonstrable adverse impact as a result of CON repeal

A study published in the Journal of Health Politics, Policy and Law assessed the impact of repealing CON laws. It found that there is “no evidence of a surge in acquisition of new facilities or in costs following removal of CON. States that lifted CON did not experience a rise in spending on hospital and physicians’ services relative to those that retained it.”¹³ That same study found that “It is doubtful that CON regulations have had much effect on quality of care, positive or negative. Such regulations may have improved access, but there is little empirical

⁹Ibid., Chapter 8, p. 2.

¹⁰Ibid., Chapter 8, p. 4.

¹¹Ibid.

¹²Federal Trade Commission, Bureau of Economics, *Federal Trade Commission Study Finds Certificate-of-Need Requirements Increase Hospital Prices and Costs*, May 5, 1987.

¹³Conover, et al, pp. 455-481.

evidence to document this.”¹⁴ And, finally, the report determined that: “The major findings about CON can be summarized as follows: first, we found no surge in expenditures after CON was lifted; second, despite a statistically significant reduction by mature programs on acute spending per capita, there was no corresponding reduction in total per capita spending.”¹⁵

(7) The CON program is detrimental to Missouri’s economy

CON review adds mountainous uncertainty (because it substitutes a political decision for an economic one), and unnecessary legal and administrative costs to new projects. The consumers ultimately bear these costs. Moreover, some health care facilities are choosing to locate in border states, e.g., Kansas, that don’t have a CON process. The result is lost jobs and the migration of new facilities and technology across state lines.

Conclusion

Despite its intent to contain health care costs, the Certificate of Need program actually increases costs and diminishes the quality of care in Missouri. It thwarts healthy competition, stifles innovation, reduces access to care, and protects entrenched facilities, no matter how inefficient they may be. The free market - not some government bureaucracy - should be allowed to determine need and encourage healthy competition based on price and quality of care. For these reasons and those set out above, the Missouri State Medical Association supports the repeal of Missouri’s antiquated CON program, and opposes any effort to expand the scope of its review. We appreciate the opportunity to provide these remarks.

¹⁴Ibid.

¹⁵Ibid.